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No. 60

In the Supreme Court of the United States

OCTOBER TERM, 1958

ABRAM FLAXER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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In the Supreme Court of the United States

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No. 965

ABRAM FLAXER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The two prevailing (Pet. App. C, pp. 1–3, 3) and two dissenting opinions (*id.*, pp. 3–5, 5) in the Court of Appeals, sitting *en banc*, which were rendered following this Court's remand of the case (354 U. S. 929) for consideration in the light of *Watkins* v. *United States*, 354 U. S. 178, have not yet been reported. The original majority (Pet. App. B, pp. 1–15) and two dissenting opinions (*id.*, pp. 15–19, 19) in the Court of Appeals, likewise sitting *en banc*, are reported at 235 F. 2d 821.[1]

[1] Judges Bastian and Burger took no part in the consideration or decision of the case on either occasion. In both instances, the court divided 4 to 3 in favor of affirming the conviction, the same judges making up the majority and mi-

JURISDICTION

The judgment of the Court of Appeals was entered on April 3, 1958 (Pet. App. A, pp. 1–2). The petition for a writ of certiorari was filed on April 29, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED[2]

1. Whether the pertinence of the information sought by the subpoena *duces tecum*—the membership list of the United Public Workers of America, showing which members were employed by the Federal Government and which by state and local governments—was or should have been sufficiently clear to petitioner (who failed to raise any issue as to pertinency), so as to sustain his conviction under 2 U. S. C. 192 for refusal to produce that list.

2. Whether Senate Resolution 366, 81st Congress, which created the Internal Security Subcommittee and defines its powers, is invalid on its face.

3. Whether a resolution authorizing a subcommittee consisting of a single Senator to "administer

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nority on each occasion. The majority originally wrote a single opinion, but on the remand Judge Prettyman wrote an opinion which was concurred in by Judges Miller and Danaher, and Judge Washington indicated in a brief concurring opinion that he "concur[red] in the result." See *infra*, pp. 3–5.

[2] We omit from the "Questions Presented" issues which were urged in petitioner's prior petition for certiorari (No. 462, Oct. Term, 1956) and are repeated in the present petition, but with respect to which, because they are not at all affected by the decision in *Watkins* v. *United States*, 354 U. S. 178, we rest on the replies set forth in our earlier brief in opposition. See *infra*, p. 22, including fn. 20.

oaths" and "take sworn testimony" includes in its grant of authority the power to entertain and pass upon a witness' objections to producing subpoenaed documents.

STATEMENT

Petitioner, on November 20, 1952, was charged in a two-count indictment (R. 2–3), returned in the United States District Court for the District of Columbia, with having willfully refused, in violation of Revised Statutes, Section 102, as amended (2 U. S. C. 192), to produce, pursuant to a subpoena *duces tecum* issued by the Subcommittee on Internal Security of the Senate Committee on the Judiciary, records of the United Public Workers of America showing the names and addresses of members of that organization who were employed by the United States Government (count 1) and by any state, county, or municipal government in the United States (count 2). Found guilty by a jury on both counts, petitioner was sentenced generally to two months' imprisonment and to pay a fine of $1,000 (R. 20–21). On appeal to the Court of Appeals for the District of Columbia Circuit, the judgment of conviction was, on June 21, 1956, affirmed by that court, sitting *en banc,* by a divided vote, Judges Bastian and Burger taking no part in the consideration or decision of the case (Pet. App. B, pp. 1–19; 235 F. 2d 821). The majority opinion was written by Judge Miller and concurred in by Judges Prettyman, Washington, and Danaher (*id.,* pp. 1–15). Chief Judge Edgerton and Judge Bazelon

joined in one dissenting opinion (*id.*, pp. 15–19) and Judge Fahy dissented in a separate dissenting opinion (*id.*, p. 19).

Thereafter, this Court, on June 24, 1957, on petition for a writ of certiorari to review this judgment, granted the petition, vacated the judgment of affirmance, and remanded the case to the Court of Appeals "for consideration in light of *Watkins* v. *United States*, 354 U. S. 178" (354 U. S. 929). The case was thereafter rebriefed and reargued in the Court of Appeals, which again sat *en banc*. On April 3, 1958, that court again affirmed the judgment of conviction (Pet. App. A, pp. 1–2), with Judges Bastian and Burger taking no part. Judge Prettyman wrote an opinion in which Judges Miller and Danaher joined (Pet. App. C, pp. 1–3). Judge Washington indicated in a brief concurring opinion that he "concur[red] in the result, finding no impediment in *Watkins*, or other controlling authority, to affirmance of the conviction" (*id.*, p. 3). Judge Fahy wrote a dissenting opinion in which Chief Judge Edgerton and Judge Bazelon joined[1] (*id.*, pp. 3–5), and Judges Edgerton and Bazelon, in addition, indicated that they thought the conviction should be reversed for

[1] This was essentially an expansion of Judge Fahy's original dissenting opinion, the basis of which—*i. e.*, the view that the Subcommittee had empowered a single member to do no more than administer oaths and take sworn testimony and that this power was not broad enough to include authority to rule upon objections to the production of documents called for by a subpoena *duces tecum*—was thought by the dissenting judges to have been "fortifie[d]" by *Watkins*.

the "additional reason stated in [their] former dissent"[4] (*id.*, p. 5).

As stated in our former brief in opposition, the facts may be summarized as follows:

In December 1950, the Senate authorized and directed its Committee on the Judiciary, or any duly authorized subcommittee, to study and investigate the administration, operation and enforcement of the internal security laws of the United States and the extent, nature, and effects of subversive activities in the United States (S. Res. 366, 81st Cong., 2d Sess., 96 Cong. Rec. 16872; see Pet. 4–5). In accordance with this authorization, the Subcommittee on Internal Security was created in January 1951 (R. 33–34). Shortly after its organization the subcommittee passed a resolution to the effect that one member would constitute a quorum for the purpose of taking testimony (R. 34–35).[5]

On September 13, 1951, the Chairman of the Subcommittee issued a subpoena *duces tecum* directing petitioner to appear before the subcommittee (R. 63). Petitioner had been National President of the United Public Workers of America since 1946 (R. 39). The United Public Workers was an organization of be-

[4] The additional reason referred to was, essentially, the rule enunciated in *Quinn* v. *United States*, 349 U. S. 155, 165–166, according to which, where a witness before a congressional committee objects to a committee question, he must, before he may be held liable to conviction under 2 U. S. C. 192 for refusal to answer, be clearly apprised that the committee demands his answer notwithstanding his objections.

[5] See S. Res. 366, Sec. 2.

tween 35,000 and 50,000 members who were employed by federal, state, county and municipal governments (R. 53). The Subcommittee had information that petitioner was a member of the Communist Party (R. 51) and he had been described by an associate as a "tried fanatic" of the Party (R. 52).[6] Mr. Ewart Guinier, secretary-treasurer of the union, and the only other national officer (R. 49), was also a member of the Communist Party, according to the Subcommittee's information (R. 53), as were certain members of the board of directors, the governing body of the union (R. 53).[7]

The subpoena directed petitioner to produce and to bring with him the financial records of the union and "records of the union showing names and addresses for all members * * * who are employed by the Federal Government of the United States of America, and records showing the names and addresses of all members who are employed by any state, county, or municipal government located anywhere within the United States of America" (R. 63).

Petitioner appeared on October 5, 1951, before Senator Watkins, sitting as the Subcommittee by designation of the Chairman (R. 37). Immediately, petitioner, who was represented by counsel (R. 39), claimed there was no quorum present (R. 38). The

[6] Officers of the union were not required to sign non-Communist affidavits in order to represent employees (R. 44–45).

[7] A man who had in the recent past been Negotiations Director of the union was also said to be a member of the Communist Party (R. 53).

objection was overruled by Senator Watkins, who stated (R. 38):

> We do have a quorum. Under our rules, which we are to make, one present makes a quorum.

Pursuant to the subpoena, petitioner produced the financial records, but failed to submit the membership lists (R. 40–41). Explaining his failure to produce the membership records, he read a prepared statement in which he asserted (R. 42):

* * * * *

> Every individual who joins a union joins it with the confidence and trust supported by tradition and law that the act of joining and maintaining membership is a personal right and freedom that is inviolate. A request such as the present constitutes a wholesale invasion of such privacy and "the right to be let alone" which is protected by the fourth amendment. Every trade-union member imposes a special trust in his union officers to protect and preserve that right. Therefore, to submit to the request in this subpena would be a violation of the trust imposed in me by my membership and a betrayal of the entire tradition of the trade-union movement in this country. I have no doubt that not a single union president would find it possible to comply with such a request.

* * * * *

In the testimony that followed, he stated that he had "no such list" with him (R. 42), but that the union "generally" has such information (R. 43). He testified that there were "approximately" 35,000 mem-

bers in his union (R. 43) and that he could not tell exactly how many were employed by the Federal Government, but he would estimate "about" five per cent (R. 43). The other 95 per cent were employed by state, county and municipal governments (R. 43), but petitioner could give only a "general idea" as to the agencies and areas where such membership was concentrated (R. 44). He named three federal agencies[*] in which the "main bulk" of the federal membership was concentrated (R. 43), but declined to name other federal agencies where the union had members because he did not have the "facts" (R. 46). He was thereupon directed to produce the records in accordance with the subpoena *duces tecum* (R. 46–47) and the following transpired (R. 47):

> Senator WATKINS. Do you understand the request made of you?
>
> Mr. FLAXER. Yes; I do.
>
> Senator WATKINS. Do you stand on your statement that you refuse to produce those?
>
> Mr. FLAXER. I didn't say I refused. I indicated the situation is such that I find myself incapable of producing them. I think if I complied with a request of that kind, first of all I don't think I have the right either in terms of our membership or in terms of the labor movement generally——
>
> Mr. ARENS [counsel to the Subcommittee]. But you do have the information?
>
> Mr. FLAXER. In a general sense, I think I have the information.

[*] Those agencies were the Bureau of Engraving, Post Office Department, and the Veterans Administration (R. 43).

Mr. ARENS. And you have not complied with the command of the subpena to produce that information.

Mr. FLAXER. I think it is an improper command, sir.

Senator WATKINS. That is the reason you have refused to bring them here today, because you think it is improper?

Mr. FLAXER. That is the reason I haven't got them.

Senator WATKINS. That is the main reason. You are directed by the committee to produce those records according to the terms of the subpena.

Mr. Flaxer persisted in his contention that the Subcommittee was "infringing on a right that workers in America have, including federal employees" (R. 47). In response to further questioning he told the subcommittee that the required lists could be prepared in a week (R. 49). Thereupon, the following colloquy occurred (R. 49–50):

Senator WATKINS. Since you have made the reply that it could be done in a week, that will be the order of the committee, that you submit that information as requested by counsel for the committee within 10 days from this date. The record will show that you of course have been given that notice and that requirement has been made, and the order has been made.

* * * * *

Mr. FLAXER. I haven't got them. I don't feel capable of producing them.

Senator WATKINS. You said you could do it within a week.

Mr. FLAXER. No; that was not the question he asked. He asked could the list be compiled within a week and I said it could.

Mr. ARENS. The information is available to you?

Mr. FLAXER. Yes.

Mr. ARENS. But you have declined to produce it; is that correct?

Mr. FLAXER. I haven't produced them.

Mr. ARENS. Will you produce it pursuant to the order of the chairman of this session within 10 days from today?

Mr. FLAXER. I will have to take that under consideration.

Senator WATKINS. That is the order, and of course we will have to take whatever steps are necessary if at the end of the time you have not produced them.

The Subcommittee never received the membership list (R. 71).

At his trial, petitioner did not take the stand. However, the defense introduced in evidence a copy of a letter, dated October 13, 1951, addressed by petitioner to Senator Watkins (R. 75). In this letter he repeated the text of the prepared statement he had read to the Subcommittee on October 5 (R. 76–77).* He concluded by stating (R. 77):

During the time that has elapsed since the date of that hearing, I have again given due consideration to the committee's request for those membership lists and have come to no other conclusion than that given to you on

* Compare R. 76–77 with R. 41, 42.

October 5th, as quoted above; and, therefore, again reiterate my request that the committee withdraw its demand for the membership lists.

Senator Watkins did not receive the letter (R. 74–75).

ARGUMENT

I

Petitioner contends (Pet. 22–26) that the Court of Appeals has "trivialized *Watkins* [354 U. S. 178] and repudiated its principles" (Pet. 22). We submit, on the contrary, that the decison below is correct under the rationale of that case.[10]

(*a*). In *Watkins*, this Court held that, since it is of the essence of the offense defined by 2 U. S. C. 192 that the question or questions which the witness has been asked and has refused to answer have been "pertinent to" the subject under inquiry by the committee, due process demands that, "*[u]nless the subject matter has been made to appear with undisputable clarity*" (from the totality of the circumstances attending the asking of the question, including the terms of the committee's authorizing resolution), and "*upon objection of the witness on grounds of pertinency,*" he be clearly apprised, at the time his answers are demanded, "what the topic under inquiry

[10] The present contention has the support of none of the dissenting judges below. While Judge Fahy's dissenting opinion, in which Judges Edgerton and Bazelon concurred, invokes the rationale of *Watkins* as "fortif[ying]" his dissenting views on the "quorum" question (discussed *infra*, pp. 18–21), the latter question is separate and distinct from the basic *Watkins* issue, as petitioner himself recognizes by his separate treatment of that question (see Pet. 26–30).

is and the connective reasoning whereby the precise questions asked relate to it" (354 U. S. at 208–215; emphasis added).

In appraising the merits of petitioner's contention that his conviction cannot be sustained in the face of this holding,[11] it is important that (a) of the approximately 35,000 members of the United Public Workers of America, whose records petitioner (the group's National President (R. 39)) was called upon to produce, "about 5 percent," or roughly 1,750 persons, were, according to petitioner's own testimony before the committee, currently in the employ of the Federal Government, the remaining 95% being in the employ of state, county, and municipal governments throughout the United States (R. 43–44); (b) petitioner had been previously identified by a witness or witnesses before the committee as a member of the Communist Party, one witness having described him as a "tried fanatic" or "hard core member" of the Party (R. 51, 52–53); and (c) other information in the committee's files indicated that, in addition to petitioner, the union's secretary-treasurer and only other national officer (one Ewart Guinier), certain members of the board of directors, the governing body of the union, and another individual who in the recent past had been the "negotiations director" of the union were also Party members (R. 49, 53). In short, the com-

[11] While *Watkins* involved a refusal to answer questions, it is not disputed that its rationale is equally applicable to a refusal to produce documents pursuant to a subpoena *duces tecum*, the offense involved here.

mittee had information that petitioner's union, the records of whose membership he was called upon to produce, was penetrated at the top by members of the Communist Party; that its highest national leader—petitioner himself—was a "hard core member" of that Party; and that some 1,750 of its members were in the current employ of the Federal Government, with the remaining 33,250 in the employ of state and local governments throughout the country.

If the committee's information was correct, it is evident that the union was, or very possibly was, a "Communist-front organization" as defined by the Internal Security Act of 1950.[12] It is also evident that, if the committee's information was correct, there were grounds for believing (at the least) that substantial numbers of the union's then-current members could well be members of the Communist Party. And since, by petitioner's own admission, close to 2,000 of those members were at that time in the employ of the Federal Government, the committee had cause to inquire into the possibility that members of the union who were also members of the Communist Party were then in the employ of the Federal Government.

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[12] Section 3 (4) of that Act (50 U. S. C. 782 (4)) defines a "Communist-front organization" as "any organization in the United States" other than a "Communist-action organization" which is "substantially directed, dominated, or controlled by a Communist-action organization" and is "primarily operated for the purpose of giving aid and support to a Communist-action organization, a Communist foreign government, or the world Communist movement." For the definition of a "Communist-action organization," see Section 3 (3) (50 U. S. C. 782 (3)).

The committee's authorizing resolution (Senate Resolution 366),[13] "authorized and directed" it to "make a complete and continuing study and investigation" of "(1) the administration, operation, and enforcement of the Internal Security Act of 1950; (2) the administration, operation, and enforcement of other laws relating to espionage, sabotage, and the protection of the internal security of the United States; and (3) the extent, nature, and effects of subversive activities in the United States, its Territories and possessions, including, but not limited to, espionage, sabotage, *and infiltration* by persons who are or may be under the domination of the foreign government or organizations controlling the world Communist movement or any other movement seeking to overthrow the Government of the United States by force and violence" (emphasis added). The specific subject under inquiry in petitioner's case was plainly germane to the field of the committee's jurisdiction and special interest, and clearly authorized by this enabling resolution.[14] Particularly is this true in the light of the formal legislative finding of Congress—as

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[13] Senate Resolution 366, 81st Cong., 2d Sess. (1950) (96 Cong. Rec. 16872). The terms of this resolution are set forth at Pet. 4, as well as at pp. 3–4 of our former brief in opposition.

[14] Petitioner states that the court below, on remand, "switched its theory of the case so as to hold the subpoena sustainable under the first two clauses of the Subcommittee's charter, whereas it had previously relied on the third clause" (Pet. 24), and argues that "this fluid transition from one source of authority to another" furnishes "another demonstration that the Subcommittee's demands had no defined legislative purpose" (*ibid.*). There is, however, no basis for the statement that the court below "switched its theory of the case." The statement assumes (1) that Judge Miller's majority opinion, when the

set forth in Section 2 (1) of the Internal Security Act (50 U. S. C. 781 (1)), the administration of which was a primary concern of this committee under its charter—that "[t]here exists a world Communist movement which, in its origins, its development, and its present practice, is a world-wide revolutionary movement whose purpose it is, by treachery, deceit, *infiltration into other groups* (*governmental and otherwise*), espionage, sabotage, terrorism, and any other means deemed necessary, to establish a Communist totalitarian dictatorship in the countries throughout the world through the medium of a world-wide Communist organization" (emphasis added).

(*b*). We submit, furthermore, that the transcript of the proceedings before the committee (see Pet. App.

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case was initially decided, relied solely on the third clause of Senate Resolution 366 as the committee's authorization for the inquiry it was engaged in when it issued the subpoena in issue, and (2) that Judge Prettyman's opinion, following the remand, relies solely on the first two clauses of the resolution (Pet. 12, 13–14). Neither assumption is correct. Judge Miller's opinion cited and relied upon all three clauses of the resolution as granting authority for the inquiry (Pet. App. B, p. 8; 235 F. 2d at 825–826). And the mere fact that Judge Prettyman's opinion, in mentioning that the Senate Resolution here involved "is more precise than the House Resolution criticized in *Watkins*," refers to *Sacher* v. *United States*, 252 F. 2d 828 (C. A. D. C.) (reversed on other grounds, May 19, 1958) (which — see at pp. 831–832 — found it necessary to consider only the first two clauses of the Senate Resolution) does not warrant petitioner's supposition (see Pet. 13) that Judge Prettyman, unlike Judge Miller, intended to rely solely on the first two clauses of the resolution. There is, in short, no sufficient reason to believe that the court below, both originally and on remand, did not look to Senate Resolution 366 in its entirety as the committee's authorization for the inquiry in which it was engaged when it subpoenaed the records here in issue.

B, pp. 10–15, where pertinent portions of the transcript are set forth as an appendix to the Court of Appeals' former opinion) shows that the pertinence of the records sought was known to petitioner. He knew the subject under inquiry—the extent of Communist infiltration of the union of which he was the national leader, and, concomitantly, the extent of Communist infiltration (through members of this union) of the Federal Government as well as state and local governments throughout the country. He must have known the relevance to that subject of the information sought by the committee, *i. e.*, the union's records of its membership, showing which members worked for the Federal Government and which for state and local governments. In any event, as observed by Judge Prettyman (Pet. App. C, p. 2), petitioner at no time objected to the production of these records on the ground of lack of pertinency to the committee's subject of inquiry [15]—doubtless because he appreciated the records' pertinency. And, as we have pointed out (*supra*, pp. 11–12), at the heart of the *Watkins* holding is the requirement that the witness,

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[15] As noted by Judge Prettyman, "Flaxer's responses to questions demonstrated that he knew what the subject of the inquiry was. In response to the subpoena he produced the financial and various other records of his union and, without objecting, presented them to the Committee on the record. He thus indicated that he recognized the nature of the question under inquiry. He refused to produce the membership lists but not upon the ground they were not pertinent. He objected on the ground that the Government as an employer is not entitled to know which of its employees belong to unions; he made an extensive statement of his position on that point" (Pet. App. C, p. 2). And while petitioner, as Judge Prettyman notes, did at one point in his colloquy with Senator Watkins use the word "ir-

in order successfully to defend against a charge of willful refusal to answer questions or comply with a subpoena, must have *raised the issue* of lack of pertinency, by appropriate objection, at the time he was called upon to answer the questions or to produce the documents. This is a proper qualification since the purpose of the requirement is to give the committee the opportunity to explain to the witness the logical nexus between the answer or document sought and the subject of inquiry, in the event that the nexus was not "undisputabl[y]" clear already.[16]

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relevant," the context in which he used it makes clear that he was not thereby objecting on pertinency grounds in the *Watkins* sense (see *id.*, pp. 2–3). His point, while it is not entirely clear, was apparently that, unless the records sought were made public (as distinguished from production in executive session, solely for the committee's use), they would be "irrelevant" as potential "blacklists"—a use to which petitioner gratuitously charged the committee with intending to put the subpoenaed records (see Pet. App. B, p. 14). Petitioner's assumption (Pet. 18, 25) that the committee, by not formally and in so many words repudiating petitioner's charge that the purpose in subpoenaing the membership records was to use them as "blacklists," acknowledged that this was their purpose is manifestly unwarranted, and is refuted, furthermore, by the entire tenor of the committee's statements during the course of petitioner's testimony (see, in particular, Pet. App. B, p. 13).

[16] In the case at bar, even if petitioner had objected to the production of the records on grounds of lack of pertinency, and the committee had explained their relevancy to him, he could not have produced them then and there because he had disabled himself in advance by refraining from preparing them and bringing them to the hearing. It thus seems, as observed by the court below in its former opinion (Pet. App. B, p. 6), "that he had decided in advance he would not obey in any circumstances." In view of this, it is somewhat ironic for petitioner to now complain (see Pet. 24–25) that the committee failed to explain to him how the records which he refused to produce were pertinent to its inquiry.

(*c*). Petitioner's subsidiary contention (Pet. 24) that under the rationale of *Watkins* the Internal Security Subcommittee's authorizing resolution—Senate Resolution 366—is invalid on its face, and thus provided no basis for a valid subpoena, is equally untenable. As pointed out in Judge Prettyman's opinion below (Pet. App. C, p. 2), it seems clear from the *Watkins* opinion that the Court did not in that decision declare the House Un-American Activities Committee's authorizing resolution to be invalid on its face. See Brief for the United States In Opposition, *Barenblatt* v. *United States*, No. 787, this Term, pp. 12–13 (certiorari granted, April 14, 1958, 356 U. S. 929). And Senate Resolution 366 (*supra*, p. 14) is more precise than the House resolution criticized in *Watkins*. In particular, it does not include the term "un-American," whose indefiniteness this Court alluded to in *Watkins* (354 U. S. at 202). The only real point of similarity between the two resolutions is the use in both of the word "subversive." Even if it were to be assumed *arguendo* that that term lacks the specificity desirable in an enabling resolution, the clarity and specificity of the remainder of Senate Resolution 366 leave little doubt of the area of authority conferred by that resolution on the Internal Security Subcommittee. See *Sacher* v. *United States*, 252 F. 2d 828, 831–832 (C. A. D. C.), No. 828, this Term, reversed on other grounds, May 19, 1958.

II

Senate Resolution 366, the source of the Internal Security Subcommittee's powers, provides in its second section (see Pet. 4–5) that "[a] majority" of the

members of the Subcommittee "shall constitute a quorum for the transaction of business, except that a lesser number, to be fixed by the * * * subcommittee, shall constitute a quorum for the purpose of administering oaths and taking sworn testimony."[17] Pursuant to this authority, and by designation of the Chairman of the Subcommittee, a single Senator—Senator Watkins, a Subcommittee member—was sitting as a subcommittee of one on the day on which petitioner appeared and refused to produce the subpoenaed records; Senator Watkins, in other words, "comprise[d] the subcommittee that day" (R. 37; see also R. 38).

When this case was decided originally by the court below, the fact that it was a "one-member" Subcommittee which heard and overruled petitioner's objection to the production of the subpoenaed records formed the sole basis of Judge Fahy's dissent. He dissented, he said, "on the ground that the Subcommittee had empowered a single member only to administer oaths and to take sworn testimony and this power was not broad enough to include authority in but one member to rule upon objections to the production of documents called for by a subpoena *duces tecum*" (Pet. App. B, p. 19).[18] On remand of the case for consideration in the light of *Watkins*, Judge Fahy, joined by Judges Edgerton and Bazelon, expressed the view that "*Watkins* fortifie[d] the basis

[17] See also Senate Resolution 180, 81st Cong., 2d Sess. (Pet. 5).

[18] Judges Edgerton and Bazelon were also of this view (see their separate dissenting opinion at Pet. App. B, p. 18). In addition, they dissented on a separate ground (see fn. 4, *supra*, p. 5).

of [his] previous dissent" (Pet. App. C, p. 4). He thus explained the basis of his view (*ibid.*):

> Under *Watkins* a delegation by Congress or by the Senate or the House of Representatives to an investigative committee must "spell out that group's jurisdiction and purpose with sufficient particularity. Those instructions are embodied in the authorizing resolution. That document is the committee's charter." 354 U. S. at 201. There the Court was considering the question of the committee's authorized scope of inquiry as it bore upon the pertinency of questions asked a witness. But the force of *Watkins* cannot be confined to issues of pertinency. *Watkins* requires as well clarity and certainty in the delegation of whatever power is sought to be exercised to compel obedience by a witness on pain of punishment for crime for not obeying. In that light *Watkins* fortifies the basis of my previous dissent. The charter here was the resolution of the parent Subcommittee delegating specified authority to a one-member subcommittee. To repeat, this subcommittee, before whom appellant appeared, was given authority only to administer oaths and to take sworn testimony. Its charter is expressed only in those terms. The broader authority claimed is not to be implied. * * *

Petitioner adopts this argument of Judge Fahy's (Pet. 29).

We submit, however, for the reasons stated in our former brief in opposition (at pp. 15–17), that the power which was lodged in Senator Watkins, sitting as a one-member subcommittee, to "tak[e] sworn testimony" clearly included the power to receive sub-

poenaed documents as normally ancillary to the taking of testimony. And if so, the power also included the authority to entertain and pass upon objections to the production of subpoenaed documents, for the same reason that it surely included the power to entertain and pass upon objections to the requiring of testimony.

Judge Fahy, it is to be noted, does not suggest that a single Senator or Congressman in whom there had been lodged the authority to take sworn testimony would lack the power—normally incident to that authority—to pass upon a witness' objections to propounded questions. *Watkins* itself would seem to recognize that in such a situation the single Senator or Congressman would possess this power: "To carry out this mission [*i. e.*, of obtaining facts upon which the full legislature can act], committees and subcommittees, *sometimes one Congressman*, are endowed with the full power of the Congress to compel testimony" (354 U. S. at 200-201, emphasis added).

Nor is there much danger that such power might be abused by a single Senator. As noted in our former brief in opposition (at p. 17), a majority of the Subcommittee was required to report petitioner's contumacy to the Senate, and it required action by the Senate itself to certify the fact of petitioner's contempt to the United States Attorney for prosecution."[19]

[19] While petitioner raised a point of "no quorum" at the outset of his appearance before the committee (R. 38-39), he made no distinction between a quorum for the purpose of taking testimony and a quorum for the purpose of ruling upon his objection to the production of the subpoenaed records. Senator Watkins, in overruling his "no quorum" objection,

III

Petitioner's remaining contentions are in substance repetitions of points made in his earlier petition for certiorari. Since none is essentially affected by the *Watkins* decision, we rest on our replies to these points in our earlier brief in opposition.[20]

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simply advised him that "[u]nder our rules, * * * one present makes a quorum" (R. 38). By failing to make a "no quorum" objection specifically addressed to the question of the power of the one-member committee to rule upon an objection to the production of subpoenaed documents, petitioner failed to give Senator Watkins an opportunity to consider that specific objection. It is possible that the Senator, had such a specific objection been made, might have reserved for the full subcommittee the question of petitioner's substantive objections to production, thereby eliminating the "quorum" point from the case. Since petitioner did not raise the point, we think he must be deemed to have waived it. Compare the discussion, *supra*, pp. 16–17, of the necessity, under *Watkins*, of the making of an objection on pertinency grounds to a question whose pertinency is not entirely clear, so as to give the committee the opportunity to explain pertinency.

[20] On the question of whether the subpoena was issued pursuant to a valid legislative purpose, or whether it involved an unwarranted "wholesale intrusion into private affairs" (Pet. 16–22), see our earlier brief in opposition (No. 462, Oct. Term, 1956), pp. 11–15; see also, on this issue, *supra*, pp. 11ff. On the "quorum" question (Pet. 26–30), see the earlier brief in opposition, pp. 15–17; see also *supra*, pp. 18–21, where the claimed impact of *Watkins* on this issue is discussed. On the issue of whether the Subcommittee's direction to petitioner to produce the subpoenaed records notwithstanding his stated objections met the requirements of *Quinn* v. *United States*, 349 U. S. 155, 165–166 (Pet. 30–31), see our earlier brief in opposition, pp. 17–19.

CONCLUSION

For the foregoing reasons, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1958.

U. S. GOVERNMENT PRINTING OFFICE: 1958